Taylor Ridge Paving and Construction, Co.[1] ***and*** **Local Union No. 309, Laborers' International Union of North America.** Case 25–CA–135372

December 16, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On September 21, 2015, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief and a cross-exception, and the Respondent filed a reply to the answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended order as modified.[2]

I. FACTUAL BACKGROUND

The Respondent, Taylor Ridge Paving and Construction, is a paving and asphalt contractor in the construction industry. The issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating its collective-bargaining agreement with Laborers' International Union of North America, Local 309 (Union). We affirm the judge's finding of a violation.

On January 23, 2012, the Respondent signed an agreement binding itself to the preexisting 2008–2012 collective-bargaining agreement (2008 Agreement) between the Associated Contractors of the Quad Cities and the Union.[3] The 2008 Agreement was set to expire on December 31, 2012, but absent 60 days' notice of termination by the Respondent or the Union, the 2008 Agreement would automatically renew for a 1-year period. It is undisputed that neither party furnished 60 days' notice of termination in advance of the December 31, 2012 expiration date of the 2008 Agreement; therefore that agreement renewed for a 1-year period ending December 31, 2013.

Also on January 23, 2012, the Respondent signed a Memorandum of Agreement (MOA)[4] with the Great Plains Laborers' District Council in which the Respondent adopted "all of those Collective Bargaining Agreements between the [District Council] and . . . the Associated Contractors." The MOA listed the Union as a member of the District Council. The MOA also included the following provisions:

> The EMPLOYER herein adopts all of those Collective Bargaining Agreements between the UNION and the . . . ASSOCIATED CONTRACTORS OF THE QUAD CITIES, . . . and all other employer associations with whom the UNION or any of its affiliated locals has a duly negotiated and executed bargaining agreement, and adopts all such agreements together with all amendments thereto.
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> * * *
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> This Agreement shall remain in full force and effect through April 30, 2013, and shall continue thereafter unless there has been sixty (60) days written notice, by registered or certified mail, by either party hereto of the desire to modify and amend this Agreement for negotiations. The EMPLOYER and the UNION agree to be bound by the area-wide negotiated contracts with the various Associations, incorporating them into this Memorandum of Agreement **and extending this Agreement for the life of the newly negotiated contract,** if not notified within the specified period of time (emphasis added).

Based on these provisions, the judge found that the MOA had an April 30, 2013 expiration date, but would continue in effect and bind the parties to "any newly negotiated contract," unless either party gave 60 days' notice of intent "to modify and amend." Thus, the Respondent's signature on the MOA bound the Respondent to current and newly negotiated agreements between the Union and the Associated Contractors.

In early 2013, the Associated Contractors of the Quad Cities and the Union entered into a successor collective-bargaining agreement that was effective by its terms from January 1, 2013, to December 31, 2015 (Successor Agreement). The Successor Agreement was signed by members of the Associated Contractors and the Union on

[1] In accordance with the General Counsel's cross-exceptions and unopposed motion at the hearing, the case caption has been corrected to reflect the correct name of the Respondent.

[2] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change.

[3] The Respondent is not a member of the Associated Contractors.

[4] The judge inadvertently stated that the Respondent signed the MOA on January 23, 2013, instead of January 23, 2012. This inadvertent error does not affect our decision.

various dates from February to April 2013. Although the Respondent did not sign the Successor Agreement, the judge found that the Respondent was bound by this agreement, by virtue of its signature on the extended 2008 Agreement, along with the MOA, above (collectively, the Agreements).

On October 30, 2013, the Respondent wrote the Union, stating that it "has determined to terminate our contract with Laborer's Local 309 effective at the end of the contract on 31 December 2013." The letter did not specify whether Respondent sought to terminate the 2008 Agreement, the MOA, or both. Thereafter, the Respondent sent the Union its last signed pension contribution report, which was dated December 15, 2013, but was received on January 27, 2014.[5]

The Respondent sent a second letter to the Union on January 23, 2014, stating that it "has determined to terminate our contract and the Memorandum of Agreement with Laborer's Local 309 effective at the end of the contract and/or Memorandum of Agreement on 30 April 2014." Union Business Manager Brad Long telephoned the Respondent regarding this letter on January 27 or 28, 2014. In the course of that call, the Respondent's vice president and part owner, Chris Dowell, told Long that he "want[ed] out of the agreement" and that the Respondent "is not going to pay the benefits no more." Long responded that "it does not work that way, you have to follow the Collective Bargaining Agreement." On January 28, 2014, the Respondent's president and part owner, Lindsay Dowell, told Long she was certain she could get out of the agreement. Again, Long responded, "it doesn't work that way."

The Respondent's business is seasonal; it generally operates for 7 to 8 months of the year, as it is unable to lay asphalt in cold weather. The Respondent, therefore, did not operate from at least January to March 2014. In late March or early April 2014, the Union attempted to refer an asphalt job to the Respondent. Chris Dowell refused the referral and stated that, as far as he was concerned, there was no existing agreement between the Respondent and the Union—a claim the Union disputed. The Respondent then sent the Union a third letter on April 29, 2014, stating that it was "terminating the bargaining relationship with Laborer's Local 309 effective immediately" and that there was "no obligation to bargain." After consulting with counsel, the Union responded in a May 13, 2014 letter, refuting the Respondent's contentions and stating that the Respondent was clearly signatory to the Successor Agreement which terminated December 31, 2015. The Union filed the charge in this case on August 26, 2014.

In her decision, the judge found that the Respondent was bound by the Successor Agreement through December 31, 2015, pursuant to the provision in the MOA binding the Respondent to all newly negotiated agreements. Thus, the judge concluded that the Respondent's attempted repudiation of the agreements prior to that date violated Section 8(a)(5) and (1) of the Act. The judge additionally rejected the Respondent's argument that the General Counsel's complaint was untimely under Section 10(b) of the Act, finding that the Respondent had not provided clear and unequivocal repudiation of the contracts until the April 29, 2014 letter, and the charge was therefore filed within 6 months of the unfair labor practice.[6] For the reasons that follow, we agree with the judge's conclusions that the charge is not barred by 10(b) and that the Respondent unlawfully repudiated the agreements.

II. ANALYSIS

Under Section 8(f) of the Act, employers and unions in the construction industry are permitted to enter into collective-bargaining agreements before the unions have established their majority status. Parties entering into 8(f) agreements are bound to those contracts for their terms, but either party is free to repudiate the collective-bargaining relationship once the 8(f) contract expires. See *John Deklewa & Sons*, 282 NLRB 1375, 1386 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert denied 488 U.S. 889 (1988).

Construction industry employers can bind themselves to 8(f) agreements by various means. For example, employers may enter into 8(f) agreements directly, through membership in multi-employer associations which bargain on their behalf. Employers that are not members of a multi-employer association may also execute memoranda of understanding ("me-too" agreements) which bind them to agreements negotiated by the union and the association. *GEM Management Co.*, 339 NLRB 489, 496 (2003), enfd. 107 Fed.Appx. 576 (6th Cir. 2004). These "me-too" agreements may bind an employer not only to an existing agreement, but to successor master contracts negotiated between the employer association

[5] The report includes the following language: "The signature certifies this report is correct and hereby becomes or continues as a signatory employer to the currently applicable collective bargaining agreement with Local Union 309. . . ." On the report, the Respondent checked the box indicating that it wanted the Union to send additional contribution report forms.

[6] The Respondent also argued that the unit was comprised of a single employee and it was therefore not obligated to bargain with the Union. For the reasons stated by the judge, we reject this affirmative defense.

and union. See, e.g., *W. J. Holloway & Son*, 307 NLRB 487, 489 (1992) (agreement employer signed bound it to terms of current master agreement and "any successor agreements"); *Construction Labor Unlimited*, 312 NLRB 364, 367 (1993), enfd. 41 F.3d 1501 (2d Cir. 1994) (acceptance agreement bound an employer to current master agreement and "any successor agreement(s)"); *Neosho Construction Co.,* 305 NLRB 100, 100 (1991) (agreement bound employer to "all future master agreements"). In order to determine an employer's obligation under a "me-too" agreement, the Board will look to the actual terms of the separate agreement(s) referenced in the "me-too" document it signs. If those separate agreements have automatic renewal provisions, those renewal provisions will be given effect and bind the non-signatory "me-too" employer to the continuation of the agreements. See *Cedar Valley Corp*., 302 NLRB 823, 823 (1991), enfd. 977 F.2d 1211 (8th Cir. 1992) (respondent bound by newly negotiated "me-too" contract; attempted repudiation during the term of a current contract was invalid).

Examining the terms of the separate agreements here, the judge first found that the Respondent was bound by the 2008 Agreement, which had automatically extended for a year beyond its December 31, 2012 termination date due to the Respondent's failure to give the required 60-day notice of termination. The judge next found that the Respondent was bound by the MOA it signed (containing a "me-too" agreement) which was effective until April 30, 2013, and thereafter unless 60 days' written notice of intent to terminate was given—notice the judge found the Respondent failed to provide. Finally, the judge found that the MOA—by its express terms—additionally bound the Respondent to any existing agreements between the Union and the Associated Contractors, as well as "newly negotiated contracts." Because the Union and the Associated Contractors entered into the Successor Agreement while the MOA remained in effect, the judge found that the 2013–2015 Successor Agreement extended the life of the MOA until December 31, 2015.[7]

We agree with the judge's reading of the three applicable contracts, as described above. We therefore find that the Respondent was bound to the 2013–2015 Successor Agreement. See *W. J. Holloway & Son*, 307 NLRB at 489 (agreement employer signed bound it to terms of current master agreement and "any successor agreements"). Thus, the Respondent was not free to terminate the Successor Agreement until 60 days prior to its expiration—October 31, 2015. See *GEM Management Co*., 339 NLRB at 496; *Cedar Valley Corp*., 302 NLRB at 823. Accordingly, the Respondent's repudiation was unlawful. See *Cedar Valley*, 302 NLRB at 823 ("A party may not lawfully repudiate an 8(f) agreement during its term.") (citing *John Deklewa & Sons,* supra).

Contrary to our dissenting colleague, we also agree with the judge's finding that the Respondent failed to establish, as an affirmative defense, that the Union's unfair labor practice charge was time barred by Section 10(b) of the Act.[8] The Board has long required "a party, in order to avoid the time bar, to file an unfair labor practice charge within 6 months of its receipt of clear and unequivocal notice of total contract repudiation." *A & L Underground*, 302 NLRB 467, 468 (1991). "[T]he Board's long-settled rule [is] that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act." Id. at 469. "[T]he burden of showing that the charging party was on clear and unequivocal notice of the violation rests on the respondent." Id. The time-bar does not apply where the charging party's "delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party." Id. Here, the Respondent has not met its high burden of proof.

In this case, the charge was filed and served on August 26, 2014, so the 10(b) period started on February 26, 2014. We find that the Union did not have clear and unequivocal notice that the Respondent had repudiated the Successor Agreement prior to February 26. While the Respondent relies on its two letters (October 2013 and January 2014) and two phone calls in late January

[7] Our dissenting colleague asserts that we impose the Successor Agreement on an "unwitting employer," contrary to *Deklewa*, "since the Respondent had no way of knowing, when it signed the 2008 Agreement and the MOA, that it would be bound by an agreement that did not even exist at that time." We disagree with both propositions—i.e. that our decision runs contrary to *Deklewa*, and that the Employer was "unwitting." While, under *Deklewa*, either party may repudiate an agreement at the time of expiration, "[w]hether the contract itself permits repudiation. . . is another matter." See *Sheet Metal Workers Local 2 v. McElroy's, Inc.*, 500 F.3d 1093, 1097–1099 (10th Cir. 2007), and cases cited therein. Thus, nothing in *Deklewa* or the Act prohibits duration clauses in 8(f) agreements that contain a contractual obligation to negotiate a successor agreement. Id. Furthermore, our colleague errs in asserting that it is "contrary to the MOA's own duration provision" to find that the MOA was extended until the Successor Agreement terminated. That is exactly what the MOA provides: that the Respondent will be bound by area-wide negotiated contracts with the Associations, and that those contracts will be incorporated into the MOA, "extending this Agreement [the MOA] for the life of the newly negotiated contract." We will honor that agreement. See also *W. J. Holloway & Son*, 307 NLRB at 489; *Neosho Construction Co.*, 305 NLRB at 100.

[8] Section 10(b) provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board…."

2014 to the Union as evidence of its intent to terminate the Agreements, we find that all four communications were insufficient to give clear and unequivocal notice that the Respondent was repudiating the Agreements. Indeed, the Respondent created confusion through these communications by referencing two different effective dates for contract termination, using tentative language in the calls, and failing to clarify which of the contractual relationships it was terminating.[9] See *A & L Underground*, 302 at 468.

Moreover, it is undisputed that, due to the seasonal nature of the construction business, the Respondent had no active operations from January to March of 2014. Thus, it was not until late March or early April 2014 that the Respondent refused an attempted referral of work from the Union, claiming that the Respondent was not bound by a contract. That action, combined with the Respondent's letter dated April 29, 2014, which terminated any existing contract immediately and declared there was no obligation to bargain, provided clear notice of contract repudiation. Because these actions occurred within 6 months of the date the charge was filed and served, however, the charge was timely.

Finally, the Respondent also acted inconsistently with any attempted repudiation by requesting additional contribution forms (presumably for future submissions when it resumed operations in March), thereby sending the Union "conflicting signals." See, e.g., *Gulf Coast Rebar, Inc.,* 365 NLRB No. 128, slip op. at 2 (2017) (noting that respondent sent the Union a "conflicting signal" concerning its position on the Agreement's continuing validity by seeking to arbitrate after repudiation); *Vallow Floor Coverings, Inc.*, 335 NLRB 20, 20 (2001) (distinguishing between failure to abide by terms of collective bargaining agreement and outright repudiation). Taken together, these factors amply support the judge's conclusion that the Respondent did not effectively repudiate the contractual relationship with the Union (in both the Successor Agreement and the MOA) until April 29, 2014, well within the 10(b) period.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Taylor Ridge Paving and Construction, Co., Taylor Ridge, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Compensate the unit employees for any adverse tax consequences of receiving a lump-sum backpay award, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 16, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

The issue in this case seems simple enough, but the case itself is complicated. The issue is whether the employer, Taylor Ridge Paving and Construction, Co. (Taylor Ridge or Respondent), violated Section 8(a)(5) of the National Labor Relations Act (NLRA or Act) by refusing to comply with a 2013–2015 collective-bargaining agreement (CBA). The 2013-2015 CBA was not negotiated or explicitly agreed to by Taylor Ridge. Nonetheless, the judge found, and my colleagues agree, that Tay-

[9] As noted above, it is undisputed that the Respondent failed to furnish 60 days' notice of termination of the 2008 agreement by October 31, 2012, thereby renewing the contractual relationship for 1 year (until December 31, 2013). Thus, by the time the two letters were sent and the phone calls made, the Respondent was already bound to the Successor Agreement, which was entered into in early 2013. Accordingly, both the October 30, 2013 letter (noting a December 31, 2013 contract termination date) and the January 23, 2014 letter (noting an April 30, 2014 termination date) referenced nonexistent contract termination dates.

Likewise, both of the Respondent's January 2014 phone calls to the Union were insufficiently specific to give clear and unequivocal notice of repudiation of the Agreements. The Respondent's January 27 or 28 call from Brad Long to Chris Dowell, in which Dowell said he "'wanted out' of the agreement," failed to specify which agreement (i.e. the 2008 Agreement, the MOA, or the Successor Agreement) the Respondent wished to terminate. Likewise, the Respondent's January 28 phone call from President Lindsay Dowell to the Union in which she expressed that she was "certain that she could get [Respondent] out of the Agreement" was merely a threat of future action and therefore did not constitute clear and unequivocal notice that the Respondent was immediately repudiating the agreements. See *Howard Electrical & Mechanical*, 293 NLRB 472, 475 (1989) ("Notice of an intent to commit an unlawful unilateral implementation . . . does not trigger the 10(b) period with respect to the unlawful act itself."), enfd. 931 F.2d 63 (10th Cir. 1991).

lor Ridge was bound by the 2013–2015 CBA based on the following events.

> (1) On January 23, 2012, Taylor Ridge signed an agreement that bound it to a 2008–2012 CBA, expiring December 31, 2012, between the Associated Contractors of the Quad Cities and Laborers' International Union of North America, Local 309. The 2008–2012 CBA contained an automatic-renewal provision extending the CBA one year at a time, unless written notice of intent to modify or terminate was served 60 days before expiration. No written notice having been served, the 2008–2012 CBA extended through December 31, 2013.
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> (2) Also on January 23, 2012, Taylor Ridge signed a Memorandum of Agreement (MOA) with a Laborers' Union affiliate.[1] The MOA stated that it was effective "through April 30, 2013," with an automatic-renewal provision extending it thereafter "unless there has been sixty (60) days written notice . . . by either party hereto of the desire to modify and amend this Agreement for negotiations." However, the MOA also stated that the employer, by signing the MOA, adopted various "area-wide negotiated contracts," and the MOA further provided that it would be extended by each of those contracts "for the life of the newly negotiated contract, if not notified within the specified period of time."
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> (3) On October 30, 2013, Taylor Ridge sent Local 309 a letter stating that it "has determined to terminate our contract with Laborer's Local 309 effective at the end of the contract on 31 December, 2013." On January 23, 2014, Taylor Ridge sent Local 309 a second letter, stating that it "has determined to terminate our contract and the Memorandum of Agreement with Laborer's Local 309 effective at the end of the contract and/or Memorandum of Agreement on 30 April 2014."

According to my colleagues and the judge, the MOA automatically renewed because Taylor Ridge failed to give Local 309 60 days' written notice prior to the MOA's April 30, 2013 expiration, and this meant that Taylor Ridge continued to be bound to the MOA after April 30, 2013, which then resulted in Taylor Ridge being bound to a successor 2013–2015 CBA entered into between Local 309 and the Associated Contractors of the Quad Cities.

[1] The MOA was signed by Taylor Ridge and the Great Plains Laborers' District Council, affiliated with the Laborers' International Union of North America, AFL–CIO. The judge mistakenly stated that Taylor Ridge signed the MOA on January 23, 2013. Taylor Ridge signed the MOA on January 23, 2012, the same day it signed the agreement that bound it to the 2008–2012 CBA between the Associated Contractors of the Quad Cities and Local 309.

For two reasons, I respectfully disagree with my colleagues and the judge.

First, as explained in Part A below, Section 10(b) of the Act bars any claims "occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made," and I believe the allegation against Taylor Ridge—based on a charge filed outside the 6-month limitations period—is barred by Section 10(b).

Second, as explained in Part B below, the record contradicts the judge's and my colleagues' conclusions. In my view, the facts reveal that, in the absence of a timely 60-day notice of termination prior to December 31, 2012, the 2008–2012 CBA automatically renewed for a one-year period ending December 31, 2013; and the two written notices of termination from Taylor Ridge—sent October 30, 2013, and January 23, 2014, respectively—effectively terminated the extended 2008–2012 CBA and the MOA, consistent with their provisions. Therefore, under established Board case law regarding construction industry pre-hire agreements, Taylor Ridge was not bound by the successor 2013–2015 CBA negotiated between Local 309 and the Associated Contractors of the Quad Cities.

Background

On January 23, 2012, the Respondent signed two agreements (collectively, the Agreements). First, the Respondent signed an agreement that bound the Respondent to the 2008–2012 collective-bargaining agreement (2008–2012 Agreement) between the Associated Contractors of the Quad Cities and the Laborers' International Union of North America, Local 309 (Union). The 2008–2012 Agreement expired by its terms on December 31, 2012, but absent 60 days' notice of termination by the Respondent or the Union, the 2008–2012 Agreement renewed for a 1-year period.

Second, the Respondent signed a Memorandum of Agreement (MOA) with the Great Plains Laborers' District Council that bound the Respondent to "the area-wide negotiated contracts with the various [Contractors'] Associations" listed in the MOA, including the Associated Contractors of the Quad Cities, and the listed Laborers local unions, including the Union. The MOA also included the following provision:

> This Agreement shall remain in full force and effect through April 30, 2013, and shall continue thereafter unless there has been sixty (60) days written notice, by registered or certified mail, by either party hereto of the desire to modify and amend this Agreement for negotiations. The EMPLOYER and the UNION agree to be bound by the area-wide negotiated contracts with the

> various Associations, incorporating them into this Memorandum of Agreement and extending this Agreement for the life of the newly negotiated contract, if not notified within the specified period of time.

Based on this provision, the judge found that the MOA expired on April 30, 2013, but would continue in effect unless either party gave 60 days' notice of intent "to modify and amend." The Associated Contractors of the Quad Cities and the Union entered into a successor collective-bargaining agreement that was effective by its terms from January 1, 2013 to December 31, 2015 (2013–2015 Agreement). The Respondent never signed either the 2013-2015 Agreement or any agreement that bound it to the 2013–2015 Agreement.

It is undisputed that the Respondent did not furnish 60 days' notice of termination in advance of the December 31, 2012 expiration date of the 2008–2012 Agreement, and therefore the 2008–2012 Agreement renewed for a 1-year period ending December 31, 2013. On October 30, 2013, the Respondent sent the Union a letter stating that it "has determined to terminate our contract with Laborer's Local 309 effective at the end of the contract on 31 December, 2013." Thereafter, the Respondent sent the Union its last pension contribution form, which was dated December 15, 2013, but was received on January 27, 2014.

The Respondent sent a second letter to the Union on January 23, 2014, stating that it "has determined to terminate our contract and the Memorandum of Agreement with Laborer's Local 309 effective at the end of the contract and/or Memorandum of Agreement on 30 April 2014." Union Business Manager Brad Long telephoned the Respondent regarding this letter on January 27 or 28, 2014, and during that call the Respondent's vice president and part owner, Chris Dowell, told Long that he "want[ed] out of the agreement" and that the Respondent "is not going to pay the benefits no more." On January 28, 2014, the Respondent's president and part owner, Lindsey Dowell, told Long she was certain she could get out of the agreement. Long replied that "it doesn't work that way." In late March or early April 2014, the Union attempted to refer a paving contract to the Respondent. The Respondent refused the referral and stated that there was no existing agreement between the Respondent and the Union. The Respondent then sent the Union a third letter on April 29, 2014, stating that it was "terminating the bargaining relationship with Laborer's Local 309 effective immediately" and that there was "no obligation to bargain." After consulting counsel, the Union responded by letter dated May 13, 2014, stating that "it is very clear your Company is currently signatory to the Laborers'. The current termination date of the Agreement is December 31, 2015 if executed properly." The Union filed the charge in this case on August 26, 2014.

Discussion

A. The Complaint is Time Barred under Section 10(b) of the Act

NLRA Section 10(b) relevantly provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." Repudiation of a collective-bargaining agreement is not a continuing violation, and therefore the 6-month limitations period established in Section 10(b) begins to run when the nonrepudiating party has clear and unequivocal notice that the agreement has been repudiated. *A & L Underground*, 302 NLRB 467, 469 (1991); *Vallow Floor Coverings*, 335 NLRB 20, 20 (2001). Here, the 10(b) time period began to run when the Union received clear and unequivocal notice that the Respondent was repudiating the Agreements. I believe that such notice was provided no later than January 2014. Because the charge was not filed until August 26, 2014, it was untimely.

As set forth above, the Respondent notified the Union in writing on October 30, 2013, that it was terminating the 2008–2012 Agreement (which had renewed for 1 year) effective December 31, 2013. On January 23, 2014, the Respondent notified the Union that it was terminating the MOA effective April 30, 2014. During subsequent phone calls between the Respondent and the Union in late January 2014, the Respondent confirmed that it wanted out and, effective immediately, would no longer pay benefits. These communications provided clear and unequivocal notice to the Union, no later than January 28, 2014, that the Respondent had repudiated all of its agreements with the Union. The Union filed its charge almost seven months later, on August 26, 2014. Accordingly, the charge is time barred.

The majority finds that the Respondent's communications to the Union were not sufficiently clear and unequivocal but rather were mere threats to commit an unfair labor practice on some future date, and in any event those communications were undercut by the pension contribution form dated December 15, 2013. Their reasoning does not withstand scrutiny.

First, I recognize that a mere threat to repudiate a collective-bargaining agreement does not start the running of the 10(b) period with respect to a subsequent repudiation. See, e.g., *Howard Electrical & Mechanical*, 293 NLRB 472, 475 (1989), enfd. 931 F.2d 63 (10th Cir.

1991). But that principle has no application here. The Respondent did not, as in *Howard Electrical,* announce that it would act on some unspecified future date. Rather, its written notices presently announced that it "had determined" to terminate each agreement; the notices clearly indicated the effective date of the terminations; and in its late January 2014 oral communications with the Union, the Respondent made clear that the intent of its October and January letters was to get "out" of its agreements with the Union. Neither did the Respondent's notices make contract termination contingent on some future event that might or might not occur. See *Stage Employees IATSE Local 659*, 276 NLRB 881, 882 (1985) (finding that "notice was conditional rather than unequivocal" because repudiation was predicated "upon the happening of a certain event"). The Respondent's October and January letters did provide advance notice of termination, and they did so because the agreements explicitly *required* advance notice.[2] It defies reason to suggest that the Respondent's October and January notices were mere threats to commit a future act of repudiation because the Respondent followed to the letter the very method for providing notice of contract termination to which the parties had agreed. Moreover, the Respondent's announcement, no later than January 28, 2014, that it was "not going to pay the benefits no more" made clear that the Respondent was halting the paying of benefits effectively immediately.[3]

Second, I do not believe that the Respondent's act of sending its final pension contribution form dated December 15, 2013, was conduct inconsistent with either its prior communications to the Union or with contract repudiation. The 2008–2012 Agreement had renewed through December 31, 2013, and there is no dispute that the Respondent was contractually obligated to send the December 2013 report and make the pension contributions indicated therein. The Respondent's compliance with these obligations does not undercut its timely October 2013 announcement that it was terminating the renewed 2008–2012 Agreement effective December 31, 2013. Indeed, because the form was dated December 15, 2013, and related to contributions for work performed in 2013, it could not have misled the Union into believing that the Respondent was reaffirming contractual obligations *after* December 31, 2013. Moreover, on January 27 or 28, 2014, the Respondent informed the Union—after the Union had received the December 2013 contribution report—that it was "not going to pay the benefits no more." A finding of conduct inconsistent with repudiation is especially unwarranted under these circumstances.

Accordingly, even if the Respondent's repudiation of the Agreements was unlawful, the Union's charge alleging as much was filed outside the 10(b) period, and the complaint must be dismissed.

B. The Notices of Contract Termination Served by Taylor Ridge Were Timely and Should Be Given Effect

Apart from the untimeliness of the Union's charge under Section 10(b), I believe the reasoning of my colleagues and the judge is contradicted by the record, basic principles governing the interpretation of collective-bargaining agreements, and established Board case law regarding construction industry prehire agreements.

As noted above, the Respondent signed two agreements with the Union: the 2008–2012 Agreement (more precisely, an agreement that bound the Respondent to the 2008–2012 Agreement) and the MOA. Article 38 of the 2008–2012 Agreement stated that after December 31, 2012, the 2008–2012 Agreement "shall renew from year to year, unless either party serves written notice upon the other of intent to modify or terminate the Agreement not less than sixty (60) days prior to any expiration date." Because neither the Respondent nor the Union served 60 days' notice of termination or modification prior to December 31, 2012, it is clear that the 2008–2012 Agreement automatically renewed for a 1-year period, binding the parties until December 31, 2013. As noted previously, on October 30, 2013, Taylor Ridge sent the Union a letter stating that it "has determined to terminate our contract with Laborer's Local 309 effective at the end of the contract on 31 December, 2013." This constituted an effective 60-day notice to terminate the 2008–2012 Agreement, which, having automatically renewed, remained in force until December 31, 2013.

Likewise, on January 23, 2014, Taylor Ridge sent the Union a second letter, stating that it "has determined to terminate our contract and the Memorandum of Agreement with Laborer's Local 309 effective at the end of the contract and/or Memorandum of Agreement on 30 April

[2] Article 38 of the 2008–2012 Agreement provided for automatic renewal unless notice of intent to modify or terminate was served 60 days in advance. Likewise, Paragraph 8 of the MOA provided that the MOA would continue after April 30, 2013, absent 60 days' written notice that either party desired to modify and amend the MOA.

[3] The judge, whose decision my colleagues adopt, specifically found that the Respondent's failure to pay the benefits was evidence of complete repudiation. In these circumstances, I believe it is especially unreasonable for my colleagues to find that the announcement that the Respondent was taking that step was insufficient notice of contract repudiation.

The majority suggests that the Respondent's third letter, dated April 29, 2014, was materially different from the first two letters in providing unequivocal notice of repudiation. All three letters, however, fully and completely terminated the contracts at issue. None of the letters employed threatening or conditional language that the Board has found insufficient to repudiate a contract. If the third letter provided effective notice of repudiation, as the majority finds, then the earlier letters similarly provided effective notice of repudiation.

2014." Again, the MOA's duration provision stated that it was effective after April 30, 2013 "unless there has been sixty . . . days written notice . . . of the desire to modify and amend [the] Agreement for negotiations." Because Taylor Ridge's letter, sent January 23, 2014, advised the Union that the MOA would terminate April 30, 2014—97 days later—this letter clearly satisfied the MOA duration clause's requirement of 60 days' written notice.

My colleagues disagree with this analysis. In their view, Article 38 of the 2008–2012 Agreement—i.e., the duration clause of that agreement—was implicitly repealed by the MOA, which, as noted previously, stated that "[t]he EMPLOYER and the UNION agree to be bound by the area-wide negotiated contracts with the various Associations, incorporating them into this Memorandum of Agreement and extending this Agreement for the life of the newly negotiated contract, if not notified within the specified period of time." My colleagues find that by signing the MOA, the Respondent agreed to be bound by any *successor* agreement negotiated by the Union and the Associated Contractors of the Quad Cities, *even if the MOA itself was terminated in the meantime*. Thus, under my colleagues' interpretation, on the same day the Respondent signed an agreement binding it to the 2008–2012 Agreement—which provided a mechanism for its termination under the terms set forth in Article 38 of that agreement—the Respondent *also* agreed to *surrender* the termination rights provided in Article 38 of the 2008–2012 Agreement and to be bound by any *successor* agreement entered into by the Union and the Associated Contractors of the Quad Cities. Moreover, under my colleagues' interpretation, the Respondent also agreed, in advance, to extend the duration of the MOA until that successor agreement terminated, which is contrary to the MOA's own duration provision.

For several reasons, I believe that the text of the MOA does not support the reading my colleagues place on it, and even if it did, I believe that their interpretation of the MOA is contrary to our statute.

First, nothing in the MOA expressly bound the Respondent to *successor* agreements. The MOA bound the Respondent to "the area-wide negotiated contracts with the various Associations"—such as the 2008–2012 Agreement between the Union and the Associated Contractors of the Quad Cities—but nowhere does the MOA indicate that it bound the Respondent to agreements successive to those in force at the time the MOA was signed. The MOA states that it will be extended for the life of "the newly-negotiated contract," but the MOA does not identify the contract to which this provision refers. Moreover, the MOA provides for this extension for the life of "the [unspecified] newly-negotiated contract," but only "if not notified within the specified period of time." What is this "specified period of time"? Does this language refer to the date specified in the MOA, or does it refer to a date specified in the underlying "area-wide negotiated contract[]"? In light of these qualifications, uncertainties, and ambiguities, I believe that the General Counsel has failed to prove that the MOA bound the Respondent to the 2013–2015 Agreement.

Second, my colleagues' analysis is inconsistent with longstanding NLRB case law regarding construction industry prehire agreements. It bears emphasis that the construction industry agreements in this case were entered into pursuant to Section 8(f) of the Act, which permits an employer "engaged primarily in the building and construction industry" to recognize and enter into a collective-bargaining agreement with a union *without* any showing of majority union support. Indeed, an employer in the building and construction industry may enter into a collective-bargaining agreement even if it does not yet have *any* employees at the time it enters into the agreement. For this reason, 8(f) agreements are also referred to as prehire agreements. However, "upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship." *John Deklewa & Sons*, 282 NLRB 1375, 1377–1378 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

In the instant case, the Respondent was party to two 8(f) agreements, each of which contained an automatic renewal clause. The Respondent exercised its right of repudiation under *Deklewa* by clearly notifying the Union that it intended to terminate those agreements when they expired. Those notices were sent in advance of the agreements' expiration dates as required by the terms of the agreements themselves. Moreover, the Union received these notices at least 7 months prior to the date it filed an unfair labor practice charge.

The Board held in *Deklewa* that either party to an 8(f) bargaining relationship—a relationship in which the union does *not* enjoy a presumption of ongoing majority support—is entitled to repudiate the relationship when their 8(f) prehire agreement expires. As the Board there explained, "the obligations we impose on an 8(f) employer . . . are limited to prohibiting the unilateral repudiation of the agreement until it expires or until that employer's unit employees vote to reject or change their representative. Importantly, this limited obligation is not imposed on unwitting employers. Rather, it is a reasonable quid pro quo that is imposed only when an employer voluntarily recognizes the union, enters into a collective-

bargaining agreement, and then sets about enjoying the benefits and assuming the obligations of the agreement." Id. at 1387. So also, "[t]he enforceable Section 9(a) status we confer on signatory unions is also only coextensive with the bargaining agreement that is the source of its exclusive representational authority." Id. And the Board emphasized that all parties to an 8(f) relationship have the right to "know their respective rights, privileges, and obligations at all stages in their relationship." Id. at 1385.

The majority's interpretation of the MOA contradicts each of these requirements. *Deklewa* only requires an employer that signs an 8(f) agreement to adhere to that agreement until it expires, at which time the employer is free to repudiate the 8(f) bargaining relationship. Here, the Respondent complied with its obligations under the 2008–2012 Agreement until that agreement terminated, and under *Deklewa* the Respondent was then free to abandon the relationship. Contrary to *Deklewa*, my colleagues find that the MOA bound the Respondent to the 2013–2015 Agreement as well. Thus, the Respondent's obligation, as my colleagues view it, was not "coextensive with the bargaining agreement" but extended long after the 2008–2012 Agreement expired.[4] My colleagues also impose this obligation on an "unwitting employer"—again contrary to *Deklewa*—since the Respondent had no way of knowing, when it signed the 2008–2012 Agreement and the MOA, that it would be bound by an agreement that did not even exist at that time. Indeed, there is no evidence that the Respondent learned of the 2013–2015 Agreement at the time the Union and the Associated Contractors of the Quad Cities entered into it, or that the Respondent knew about that agreement at the time the Respondent sent the Union its termination notices in October 2013 and January 2014. Also contrary to *Deklewa*, the parties in this case had no way of knowing "their respective rights, privileges, and obligations at all stages in their relationship." No one could have known, when the Respondent signed the 2008–2012 Agreement, that the termination rights afforded in that contract would be rendered illusory by virtue of the MOA the Respondent signed the very same day, as a result of which its contractual obligations would be deemed extended through December 31, 2015.[5]

As a final matter, I believe Taylor Ridge's January 23, 2014 letter, in which Taylor Ridge provided notice of termination of the MOA, constituted an appropriate, enforceable notice of termination under the MOA's duration clause, even though that clause did not expressly mention "termination" and instead provided only for the employer to provide notice of its "desire to *modify* and *amend* this Agreement *for negotiations*" (emphasis added). Both the NLRA and collective-bargaining agreements frequently use the terms "terminate," "termination," "modify" and "modification" interchangeably,[6] and notice of intent to "terminate" the MOA (the term used in Taylor Ridge's January 23, 2014 letter) provided effective notice of a desire to "modify" or "amend" the MOA (the terms used in the MOA itself). Moreover, if the MOA's durational language is interpreted literally as forever prohibiting any termination of the MOA, I believe such a provision would be unenforceable. Again, the MOA is a pre-hire agreement, entered into pursuant to Section 8(f) of the Act, and the record does not show that the Union has ever demonstrated that it is supported by *any* unit employees, let alone a majority. For this reason, the Board in *Deklewa* emphasized that pre-hire agreements cannot mandate continued union representation of employees, even when the agreement had a fixed duration, because this was "*too absolute* in protecting the union's representative status."[7] Nothing could be more "absolute," and more contrary to the principle of employee free choice, than to permit prehire agreements that may only be modified and amended but never terminated and that therefore remain in effect forever. Based on the statutory imperative of preserving employee free choice, the Board in *Deklewa* squarely held that "upon the expiration of [pre-hire] agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship." 282 NLRB at 1377–1378. To the extent the MOA fails to permit itself from *ever* terminating, it plainly circumvents *Deklewa* and completely frustrates the Act's requirement of majority support as a prerequisite to ongo-

[4] The Union's own communications reveal that it was not certain whether the Respondent was bound by the 2013–2015 Agreement. As noted above, even after consulting counsel the most the Union could say was that the Respondent was bound by that agreement "if executed properly."

[5] In these respects, the operation of the MOA, as interpreted by the majority, is similar to the premature extension of a collective-bargaining agreement. Under its contract bar rules, the Board will not allow such a premature extension to extinguish the right of employees and rival unions to file election petitions. Instead, the Board essentially treats the premature extension as a nullity for the purpose of fixing the open period during which such petitions may be filed. See *Deluxe Metal Furniture, Co.*, 121 NLRB 995 (1958). I believe that similar considerations counsel against an interpretation of the MOA that would effectively extinguish the Respondent's *Deklewa* repudiation rights as provided in the 2008–2012 Agreement.

[6] See, e.g., NLRA Sec. 8(d) (providing for service of "written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or . . . sixty days prior to the time it is proposed to make such termination or modification").

[7] *Deklewa*, 282 NLRB at 1383 (emphasis added).

ing union representation, which would require the Board to find such an arrangement repugnant to our statute and hence unenforceable.[8]

Conclusion

For the reasons stated above, the complaint must be dismissed because it is based on a charge that was filed beyond Section 10(b)'s 6 month limitations period, and I also respectfully dissent from my colleagues' decision on the merits.

Dated, Washington, D.C. December 16, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the Union, Local Union No. 309, Laborers' International Union of North America, as the exclusive collective-bargaining representative of all employees performing work as set forth in article 2 of the collective-bargaining agreement between the Union and the Associated Contractors of the Quad Cities (Associated Contractors), which is effective from January 1, 2013, through December 31, 2015.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL honor and comply with the terms and conditions of the 2013–2015 collective-bargaining agreement between the Union and the Associated Contractors and, absent timely written notice to the Union, any automatic renewal or extension of it.

WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of our failure to honor the collective-bargaining agreement.

WE WILL make all contractually-required contributions to the Union's fringe benefit funds that we have failed to make since April 29, 2014, and reimburse our employees, with interest, for any expenses resulting from our failure to make the required payments under the collective-bargaining agreement.

WE WILL compensate all unit employees for any adverse income tax consequences of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

TAYLOR RIDGE PAVING & CONSTRUCTION, CO.

The Board's decision can be found at www.nlrb.gov/case/25–CA–135372 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Rebekah Ramirez, Esq., for the General Counsel.
Michael E. Avakian, Esq., for the Respondent.

[8] For the reasons explained in the text, I disagree with cases suggesting that language in a prehire agreement that effectively continues such an agreement in perpetuity does not render the agreement unenforceable. See, e.g., *Sheet Metal Workers Local 2 v. McElroy's, Inc.*, 500 F.3d 1093 (10th Cir. 2007). In *Deklewa*, the Board expressly limited any Sec. 8(f) union relationship to the duration of the applicable pre-hire agreement, with either party having the right to abandon the relationship following expiration of the prehire agreement. Permitting a pre-hire agreement to be converted into an agreement in perpetuity—an agreement that can *never* be terminated—would plainly circumvent *Deklewa* and be contrary to the Act.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Peoria, Illinois, on February 12, 2015. Local Union No. 309, Laborers' International Union of North America (the Union) filed the charge on August 26, 2014,[1] and the General Counsel issued the complaint on November 25. The complaint alleges that Taylor Ridge Paving & Construction[2] (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to adhere to a collective-bargaining agreement.[3] (GC Exh. 1(c).) Respondent timely filed an answer to the complaint denying the alleged violation of the Act and asserting several affirmative defenses. (GC Exh. 1(e).) Respondent later filed an amended answer. (GC Exh. 1(f).) The parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, admits that it has been engaged in the construction industry as a provider of asphalt and paving services at its facility in Taylor Ridge, Illinois, where it annually performs services valued in excess of $50,000 in States other than the State of Illinois. (GC Exh. 1(f).) I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[5]

In its answer, Respondent denied knowledge or information sufficient to form a belief as to the statutory labor organization status of Local Union No. 309, Laborers International Union of North America (Union). Section 2(5) of the Act defines a labor organization as, "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work." Brad Long, the Union's business manager, testified without contradiction that the Union negotiates contracts, enforces contracts, and protects its members. Jeffrey Deppe, the Union's secretary-treasurer, testified without contradiction that he tries to resolve problems for employees on the job. General Counsel's Exhibit 2 is a contract between the Union and the Associated Contractors of the Quad Cities (Associated Contractors), concerning matters such as employee wages and hours of employment. Therefore, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.[6]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations

Respondent is a paving and asphalt contractor in the construction industry. Respondent generally operates for 7 to 8 months a year, based on the weather.[7] (Tr. 27.) Respondent stopped working in December 2014, and had not restarted its operations as of the date of the hearing. Id. Lindsey Dowell is Respondent's president and a 51-percent owner of Respondent. She had no previous experience in the construction industry before starting Respondent in 2011. Lindsey Dowell also holds a full-time position as a human resources specialist for the Federal Government at the Rock Island Arsenal. Lindsay Dowell's husband, Chris Dowell, is Respondent's vice president and a 49-percent owner of Respondent. Chris Dowell runs Respondent's day-to-day operations, bid jobs and finds work, and performs paving work alongside Respondent's employees. He also has extensive experience as a laborer and was previously a member of the Union. Respondent admits, and I find, that Lindsay Dowell and Chris Dowell are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

B. Respondent becomes a Signatory Contractor

When Chris Dowell formed Respondent, he decided to do so as a union shop. (Tr. 29.) As such, Respondent was able to obtain employees through the Union's hiring hall. Dowell met with Union Business Manager Brad Long three times prior to Respondent becoming a signatory contractor. (Tr. 38.) During these meetings, Brad Long went over the Union's collective-bargaining agreement and a memorandum of agreement. Brad Long gave these documents to Chris Dowell to take home. Chris Dowell brought the documents home where Lindsay Dowell signed them. Chris Dowell later returned the executed agreements to the Union.[8]

Respondent also signed an agreement with the International Union of Operating Engineers, Local 150 (Local 150), to obtain employees from its hiring hall. Respondent later terminated its

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[1] All dates are in 2014 unless otherwise indicated.

[2] The name of Respondent appears as corrected at the hearing.

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's Exhibit; "GC Exh." for General Counsel's Exhibit; "R. Br." for Respondent's brief; and "GC Br." for the General Counsel's brief.

[4] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[5] Employers engaged in nonretail enterprises, such as Respondent, meet the Board's discretionary jurisdictional standard if they have either inflow or outflow, whether direct or indirect, in excess of $50,000 annually. *Siemons Mailing Service*, 122 NLRB 81, 85 (1959).

[6] The Union's territorial jurisdiction encompasses Rock Island and Mercer Counties in Illinois and Scott, Clinton, and Muscatine Counties in Iowa. (Tr. 37.)

[7] Average low temperatures must be above freezing for Respondent to perform paving work. (Tr. 27.)

[8] Lindsay Dowell and Chris Dowell testified that they barely read and did not understand the agreements she signed. However, a party who signs a contract is bound by its terms regardless of whether he or she reads it or considers its legal consequences. *GEM Management Co.,* 339 NLRB 489, 498 fn. 22 (2003), citing *Operating Engineers Pension Trust v. Cecil Backhoe Services*, 795 F.2d, 1501, 1505 (9th Cir. 1986).

relationship with Local 150. According to reports filed with Local 150, Respondent employed up to 2 operators between December 2013 and March 2013, but one or both of these operators worked less than 5 hours per month. Beginning in April 2013, and continuing through November 2013, Respondent employed 2 operators with significant hours. December 2013 was the last month for which Respondent provided reports to Local 150. (R. Exh. 13.)

C. The Collective-Bargaining Agreement and Memorandum of Agreement

On January 232012, Lindsay Dowell signed the Articles of Agreement between the Associated Contractors and the Union (the Agreement) on behalf of Respondent. (GC Exh. 2.) By signing the Agreement, Respondent became a signatory employer. Regarding its duration and termination, the Agreement states:

> Art. 38, Sec. 1. This Agreement shall be in force and effect from January 1, 2008, through December 31, 2012, and shall renew from year to year, unless either party serves written notice upon the other of intent to modify or terminate the Agreement *not less than sixty (60) days prior to any expiration date.* Upon notice of termination or modification the parties shall promptly commence negotiations for the purpose of reaching a new or modified agreement. (Emphasis added.)

October 2, 2012, was 60 days prior to the Agreement's December 31, 2012 expiration date.

The Agreement covers, among other work, construction of and improvements to parking lots and pavements. (GC Exh. 2, p. 1.) The Agreement further gives the Union jurisdiction over all laborers' work, including the following: unloading of all materials; the use of roller compactors; loading and unloading all concrete buckets/trucks; and the use of small power equipment. (GC Exh. 2, art. 17.) The following job classifications, among many others, are listed in article 31 of the Agreement: broom man; operation of tampers; general labor (not covered elsewhere); roller compactors; asphalt raker or luteman; and asphalt or concrete curb machine operator.[9]

The following language appears on the signature page of the Agreement: "The undersigned Employer hereby becomes a signatory Employer to this Agreement between the Associated Contractors of the Quad-Cities and the Laborers' International Union of North America, Local Union No. 309." (GC Exh. 2, p. 42.)

Lindsay Dowell also signed a Memorandum of Agreement (MOA) with the Great Plains District Council, affiliated with the Laborers' International Union of North America, AFL–CIO, (the District Council) on January 23, 2013. (GC Exh. 19.) By entering into this MOA, Respondent recognized the District Council as the sole and exclusive bargaining representative for all laborers employed by Respondent in the geographical areas encompassed by the listed local unions and adopted collective-bargaining agreements between the District Council and several employer associations, including the Associated Contractors. One of the listed local unions is the Union. Specifically, the MOA states:

> The EMPLOYER herein adopts all of those Collective Bargaining Agreements between the UNION and . . . the Associated Contractors.
>
> The EMPLOYER and the UNION agree to be bound by the area-wide negotiated contracts with the various Associations, incorporating them into this Memorandum of Agreement and extending this Agreement for the life of the newly negotiated contract, if not notified within the specified period of time.

The MOA was effective through April 30, 2013. However, the MOA stated that it would continue thereafter unless sixty (60) days written notice was given, by registered or certified mail, by either party of the desire to modify or amend it. By signing the MOA, Respondent agreed to be bound by the Agreement and to extend the life of the MOA for the life of the Agreement and any newly negotiated contract, if notification of intent to terminate or modify the MOA was not given within the specified period of time. Respondent did not give notice of intent to terminate the MOA by March 1, 2013, 60 days prior to April 30, 2013.

Prior to the expiration of the Agreement on December 31, 2012, the Union and the Associated Contractors began negotiations for a successor agreement. This successor agreement is effective from January 1, 2013, through December 31, 2015. (GC Exh. 6.) All of the same language cited above concerning job classifications and jurisdiction appears in the successor agreement. Respondent did not sign the successor agreement.

D. Respondent's Hiring and Crew

Respondent began operations in the Spring of 2012. At that time, Respondent rented its equipment, including an excavator and skid loader. More recently, Respondent has acquired an asphalt paving machine. (R. Exh. 14; Tr. 186–187.)

In its first year of operations, Respondent employed two laborers hired through the Union's hiring hall. (GC Exh. 3.) According to contribution reports filed with the Union, Respondent employed tw0 to three union laborers at a time in 2012. (GC Exh. 3.) Chris Dowell is listed as one of these laborers.

From January and April 2013, Respondent listed only one laborer on its contribution reports (employee Jackie West) and it listed no union laborers in February and March 2013.[10] In May through December 2013, Respondent's contribution reports to the Union listed Chris Dowell and Jackie West as laborers. (GC Exhs. 4, 20.)

Respondent continued to submit contribution reports to the Union through November 2013.[11] These report forms, which

[9] A luteman uses a lute, a long-handled instrument that looks like a rake.

[10] Testimony established that Respondent generally does not operate in the winter months.

[11] Respondent's reports were not received by the Union for some time after the dates appearing on them. The September 2013 report was not received by the Union until November 1, 2013, the October 2013 report was not received by the Union until December 12, 2013, and the November 2013 report was not received by the Union until January 27, 2104.

were submitted and signed by Chris Dowell, included the language, "the signature certifies this report is correct and [Respondent] hereby . . . continues as a signatory employer." Moreover, the November 2013 report has a box checked indicating that Respondent wanted the Union to send it additional contribution report forms. Respondent has not sought referrals for employees from the Union or submitted any reports, dues, or benefit payments to the Union since January 2014. (Tr. 174.)

Beginning in January 2014, Respondent began operating with what Chris Dowell called a "composite crew." (Tr. 185–186; 199.) At that point, Dowell no longer classified his employees as laborers or operators. Instead, Dowell cross-trained laborers as operators and operators as laborers. Chris Dowell testified that he could not have used a composite crew as a signatory contractor with the Union or Local 150. (Tr. 199.)

Chris Dowell further testified regarding the makeup of Respondent's employee compliment during 2014. He testified that one of Respondent's employees, Alex Johnson, was a college student and part-time employee. (Tr. 183.) He further testified that another employee, Eric Holcomb, was a supervisor. (Tr. 195–196.) Respondent did not submit any other evidence, such as payroll records or personnel files, to support Dowell's assertions regarding the status of either Johnson or Holcomb or the number of employees employed by Respondent in 2014.

E. Respondent Seeks to Terminate its Relationship with the Union

In October 2013, Lindsey Dowell sent a letter to the Union indicating that Respondent "has determined to terminate our contract with Laborer's Local 309 effective at the end of the contract on 31 December 2013." (R. Exh. 1.) She did not indicate whether Respondent sought to terminate the Agreement or the MOA or both.

Respondent sent a second letter to the Union on January 23, 2014, providing what it asserted was 60 days' notice to terminate the Agreement and MOA with the Union effective April 30, 2014. (GC Exh. 7; R. Exhs. 2, 3.) Specifically, the letter stated:

> This letter is to provide you with the required 60 day notice that Taylor Ridge Paving and Construction has determined to terminate our contract and the Memorandum of Agreement with Laborer's Local 309 effective at the end of the contract and/or Memorandum of Agreement on 30 April 2014.

As of the date of Respondent's January 23 letter, the successor agreement was already in effect.

After receiving Respondent's January 23 letter, Brad Long called Chris Dowell. (Tr. 48.) Dowell told Long he was mad about being charged a late fee.[12] Dowell said he was no longer going to pay benefits and that he "wanted out" of the agreement. Long told Dowell it doesn't work that way, you have to follow the CBA.[13] (Tr. 48–49.)

On January 28, Lindsey Dowell called the Union and spoke to Brad Long. (Tr. 49.) After introducing herself, Lindsey Dowell said that she does this for a living on the Arsenal and that she is an expert. Lindsey Dowell further stated that she knows what the labor rules are and that she was certain she could get [Respondent] out of the Agreement. Long told her it doesn't work that way.[14]

In late March or early April 2014, Brad Long called Chris Dowell seeking to refer Respondent a small asphalt job. (Tr. 50.) In that conversation, Dowell stated, "as far as [I am concerned], [Respondent] did not have an agreement . . . with [the Union]. (Tr. 50.) Long replied, "I believe we do."

On April 29, Lindsey Dowell sent yet another letter to the Union. (GC Exh. 8; R. Exhs. 5–8.) In this letter, Lindsey Dowell stated that she had spoken to an employee at the NLRB and that Respondent had no obligation to bargain with the Union. She stated that Respondent had only one laborer employed at that time, Chris Dowell, and that he was also vice president and part owner of the company. She concluded by stating that Respondent was terminating the bargaining relationship with the Union effective immediately. On May 2, Brad Long sent a response to Lindsey Dowell's letter. (GC Exh. 9.) Long indicated that the Union was attempting to determine whether Respondent's attempt to terminate the Agreement was timely and lawful.

On May 11, the Union sent a letter to Respondent. GC Exh. 10. In this letter, Brad Long stated that after consulting with the Union's attorney, it was clear that Respondent remained signatory to the successor agreement, which did not expire until December 31, 2015. He also indicated that the Union had begun monitoring Respondent's work and noticed a few employees. Therefore, Long believed that Lindsey Dowell's statement that Respondent employed only one laborer was inaccurate.

F. Respondent's Work in the Union's Jurisdiction after Seeking to Terminate its Relationship with the Union

After receiving Lindsey Dowell's April 29 letter, the Union sent Secretary-Treasurer and Field Representative Jeffrey Deppe and now retired Organizer and Field Representative George Long to investigate Respondent's work.[15] Deppe observed Respondent's crew working at Kimberly Dodge, a car dealership, for 2 to 3 hours. (Tr. 115–116.) Deppe was met by Chris Dowell at this jobsite. Deppe asked Dowell if the guys working there were laborers, to which Dowell replied no. (Tr. 115.) Deppe then took pictures of the jobsite. (GC Exh. 15.) While there, he observed a tandem truck pouring asphalt into a paver. He also observed three individuals on the ground, two

[12] Respondent had been late in remitting payments to the Union was charged a late fee.

[13] I credit the testimony of Brad Long over that of Chris Dowell regarding this telephone conversation. Dowell testified that during this call he told Long that "he was done." (Tr. 174.) He further testified that he told Long that Respondent did not need the Union for hiring anymore and did not need benefits. Long's account was more specific than that of Dowell. Dowell's testimony did not recount what was said during the conversation, only the type of discussion and generalities regarding what was discussed. (Tr. 174–175.) Therefore, I credit Brad Long's version of the conversation, as set forth herein.

[14] Lindsey Dowell denied having a telephone conversation with Long in January 2014. However, I credit the testimony of Long, as I found him to be a more credible witness, as discussed infra.

[15] George Long is not related to Brad Long.

with lids, and 1 with a shovel scraping asphalt out of the tandem truck and keeping the edges of the asphalt square. He saw Chris Dowell using a whacker to pack the asphalt. Deppe testified, without contradiction, that the work he saw being performed was laborers' work.

George Long also observed Respondent's crew working at Kimberly Dodge. (Tr. 148–151.) He observed three individuals spreading and rolling rock in preparation for laying asphalt. Later, he observed 5–6 men laying blacktop and rolling. George Long testified that he observed the men using a lute, adjusting the paver and compactor, shoveling, and cleaning up, all of which he characterized, without contradiction, as laborers' work.

Deppe later observed Respondent's employees working on two other jobsites. At Co-Op Records in Moline, Illinois, Deppe observed Respondent operating with a five-person crew. (Tr. 117.) He did not talk to anyone at this jobsite. Deppe observed Chris Dowell and another individual operating a paver, and three other individuals on the ground keeping the edges of the asphalt square and whacking the asphalt.

At a shopping center on 53rd Street in Bettendorf, Iowa, Deppe observed Respondent operating with a five-person crew. (Tr. 118.) Again, he observed three individuals using lutes, come-alongs, and whackers.[16] Deppe testified that the workers running the paver would not be performing laborers' work, however, the use of lutes, shovels, and a whacker, and scraping trucks, was laborers' work.

During the last week of June, George Long observed Respondent's four to five-person crew working at Cavanaugh's Tavern, located 4–5 blocks from the Union's Davenport, Iowa office. Long observed the crew digging out blacktop, bringing in new gravel, compacting, and paving, all of which he characterized as laborers' work. (Tr. 151–152.)

In July 2014, George Long observed Respondent's five-person crew at a McDonald's near the Quad Cities airport over a period of 3 days. Long observed the crew tearing out and replacing pavement in the drive through lanes.

On May 27, 2014, the Union filed a grievance after Deppe and George Long observed Respondent operating with five to six- person crews at the various jobsites in the Quad Cities area. (GC Exh. 11; Tr. 56.) The Union alleged that Respondent had violated the Agreement by using nonunion workers to perform union work. The grievance proceeded to hearing on August 20, but no one from Respondent appeared for the hearing. The Union prevailed on the grievance.[17] (GC Exh. 11.)

III. DISCUSSION AND ANALYSIS

A. Credibility Analysis

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above.

I found Brad Long to be a credible witness. He testified in a straightforward manner and his testimony did not waver under cross-examination.[18] His recollection of the telephone calls he had with Chris and Lindsey Dowell was specific and sure. As such, I credit Brad Long's testimony over that of Chris and Lindsey Dowell.

I also found George Long to be a credible witness. He testified in a deliberate and steady manner and I did not find his testimony to be embellished in any way. His testimony was not contradicted in any way on cross-examination. I further found Jeffrey Deppe to be a credible witness. Deppe's testimony seemed frank and forthright. His testimony regarding what he observed at Respondent's jobsites in 2014 was detailed and specific. Like George Long, he did not contradict himself under cross-examination. As such, I credit the testimony of George Long and Deppe.

Conversely, I did not find either Chris Dowell or Lindsey Dowell to be a credible witness. Both gave critical testimony in response to leading questions by Respondent's counsel. (Tr.174–175, 186, 202, 205–206.) Testimony adduced by leading questions on direct examination is entitled to only minimal weight. *H.C. Thompson, Inc.,* 230 NLRB 808, 809 fn. 2 (1977).

In addition, Lindsey Dowell appeared hostile and spoke over the General Counsel during her examination. She also gave testimony that seemed insincere. For example, she gave the following testimony regarding the signing of the Agreement and the MOA:

[16] The General Counsel introduced Deppe's photographs of the Co-Op Records and shopping center jobs into evidence as GC Exhs. 13 and 14. After the admission of these exhibits, it was learned that the Union did not provide the photographs in GC Exhs. 13 and 14 to Respondent, despite Respondent's subpoena request for photographs. The Union provided Respondent with a memory card in response to the subpoena, but only the photographs from GC Exh. 15, and a few additional photographs, were on it. As such, I struck GC Exhs. 13 and 14 and placed both exhibits into a rejected exhibit file. I advised the General Counsel that she could introduce the additional photographs from the memory card provided to Respondent, but she did not move to admit the additional photographs. I also advised the General Counsel that she could examine witnesses further regarding their observation of the jobsites because the photographs were no longer in evidence. Although I struck the photographs as exhibits, I did not strike the testimony given regarding what was observed on these jobsites, and that testimony remains in the record.

[17] Although it was intimated during the trial that Respondent did not receive the grievance, it is clear that it did. In a letter dated June 18, Lindsey Dowell stated, "[Respondent] has received your grievance dated May 27, 2014." (GC Exh. 12.) She also stated that Respondent considered the grievance invalid and inappropriate, as Respondent had terminated its bargaining relationship with the Union.

[18] Although Long did ask Respondent's counsel to repeat his questions on occasion, this was because it was exceedingly noisy in the hearing room due to construction elsewhere in the building.

Q: Did you meet with the Union or–
A: No, I did not.
Q: Did your husband meet with the Union?
A: You would have to ask him.
Q: Okay. So how did you get this document to sign?
A: My husband brought it to me.

Tr. 21. It defies credulity that Lindsey Dowell would not know whether or not her husband (and business partner) met with the Union, especially in light of the fact that he brought her the Agreement and the MOA to sign. Therefore, for these reasons, as well as others stated elsewhere in the decision, I do not credit Lindsey Dowell's testimony where it conflicts with that of other witnesses.

Chris Dowell also seemed hostile to questioning by the General Counsel and failed to directly answer her questions. For example, Dowell engaged in the following exchange with the General Counsel:

Q: You met with Mr. Long prior to Taylor Ridge signing on with the Union?
A: That's correct.
Q: And then how long would you say you met with Mr. Long to discuss the Union contract before you signed it?
A: How long—
Q: Yes.
A: Do you mean days or hours or—
Q: You said - - yeah, you said that you met with him. Did you meet with him once?
A: Once that I—yeah.
Q: Did you recall?
A: Barely.
Q: You don't recall?
A: I am going to say the one time we came in and signed the contract.
Q: Okay. But you didn't sign the contract with your wife.
A: Yes.

Tr. 29–30.

Chris Dowell also contradicted himself during his testimony. For example, he initially testified that he did not sign the contribution reports that he sent to the Union on Respondent's behalf. (Tr. 169) He later testified that it was "possible" that he signed them but was "not sure." Tr. 191. Dowell only admitted signing the forms after being confronted with signed copies by the General Counsel. (GC Exh. 20; R. Exh. 11; Tr. 192.)

Furthermore, Chris Dowell gave testimony contradictory to that of his wife. While Lindsey Dowell testified that she signed the Agreement and the MOA at home, Chris Dowell testified that they "came in and signed the contract." Tr. 22, 30. Therefore, for the reasons cited here and elsewhere in this decision, I have credited the testimony of other witnesses over that of Chris and Lindsey Dowell.

B. Respondent is Bound to the Successor Agreement

The Agreement in this case is an 8(f) prehire agreement.[17] Under Section 8(f) of the Act, Congress expressly authorized the negotiation, adoption, and implementation of collective-bargaining agreements in the construction industry without initial reference to a union's majority status. *John Deklewa & Sons,* 282 NLRB 1375, 1380 (1987). Either party is free to repudiate the collective-bargaining relationship once an 8(f) agreement expires by its terms. *GEM Management Co.,* 339 NLRB 489, 496 (2003), citing *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). Additionally, an automatic renewal clause in an 8(f) agreement will be given effect and operates to bind the parties to a continuation of the agreement. *GEM Management Co.,* 339 NLRB at 496, citing Cedar Valley Corp., 302 NLRB 823 (1991), enfd. 977 F.2d 1211 (8th Cir. 1992). Neither employers nor unions who are party to 8(f) agreements are free to unilaterally repudiate such agreements prior to expiration. *John Deklewa & Sons*, 282 NLRB at 1385.

Employers in the construction industry, which are not members of an employer association, commonly bind themselves to agreements negotiated between an employer association and a union by signing what is known as a "me too" or "short form" agreement. *GEM Management Co.,* 339 NLRB at 496. These "me too" agreements sometimes bind employers to successor master contracts negotiated between an employer association and a union and are enforced by the Board. Id. The MOA in this case is such an agreement. In signing the MOA, Respondent did not become a member of the Associated Contractors, but became bound to agreements negotiated between it and the Union.

The MOA was effective through April 30, 2013. However, the MOA stated that it would continue thereafter unless sixty (60) days written notice was given, by registered or certified mail, by either party of the desire to modify or amend it. Respondent did not give notice to terminate the MOA by March 1, 2013, 60 days prior to April 30, 2013. Therefore, Respondent remained bound by the MOA after April 30, 2013.

Furthermore, I find, in agreement with the General Counsel, that the language of the MOA extended both the life of the MOA and bound Respondent to the successor agreement through December 30, 2015. GC Br. p. 15. The Board has held that an employer was bound to successor contracts when it signed a supplemental agreement whereby it consented to be bound to area association agreements until it timely served notice to terminate the agreement. *Cedar Valley Corp.,* 302 NLRB at 830. Even when an employer has not signed a document delegating bargaining authority to an association, but has

[17] Although the complaint mentions a 9(a) relationship in paragraph 5(d), this is not material. In a preceding subparagraph, the Agreement is correctly identified as an 8(f) agreement. The Board presumes that a construction industry bargaining relationship is governed by Section 8(f). *MSR Industrial Services,* 363 NLRB No. 1, slip op at 2 (2015). Additionally, the complaint correctly sets forth all of the elements of a violation of Section 8(a)(5) and (1) of the Act in paragraph 5. GC Exh. 1(c). Therefore, I find the reference to Sec. 9(a) of the Act in the complaint is of no consequence.

signed an association collective-bargaining agreement with a union providing for automatic renewal, the employer continues to be bound by the collective-bargaining agreement until it serves timely notice of termination of the agreement. Id.

The Board has even stated that, in such circumstances, the union's notice of termination of the contract served on the association does not terminate the contract as to the employer who has not delegated bargaining rights to the association. Id. citing *C.E.K. Mechanical Contractors,* 295 NLRB 635, 635 (1989), enf. denied 921 F.2d 350 (1990). In *C.E.K Mechanical Contractors,* as here, the employer signed a contract between a union and employer association at a time when it had no employees working in the union's jurisdiction and was not a member of the employer association. 295 NLRB at 635. This contract contained an automatic renewal clause, which extended the length of the contract for 1 year. Id. The Board held that the association's desire to change the contract did not preclude the effectiveness of the automatic renewal clause as to the employer. 295 NLRB at 635–636. Unlike the agreement in *C.E.K. Mechanical Contractors,* the MOA here specifically stated that absent timely notification of termination, it bind signatories to "newly negotiated" contracts. As such, I find that Respondent was and remains bound to the successor agreement.

In determining a party's obligation under a "me too" agreement, the Board will look to the language of the agreement itself, as well as to the underlying master agreement where applicable. Id. For example, in *Oklahoma Fixture Co.,* the Board held that an employer was bound to year-to-year renewals based upon the language contained in an agreement. 333 NLRB 804, 808 (2001), enf. denied 74 Fed.Appx. 31 (10th Cir. 2003). However, the contract in that case stated, "this agreement shall remain in full force and effect from year to year unless either party [notifies] the other in writing of its desire to . . . cancel . . . this agreement." The "me too" agreement in *Oklahoma Fixture Co.* did not contain any language that bound employers to newly negotiated contracts. 333 NLRB at 808–809. Instead, the agreements at issue in *Oklahoma Fixture Co.* created a year-to-year renewal absent termination. Conversely, the MOA in this case binds Respondent to "newly negotiated contract[s]" absent notification. (GC Exh. 19, par. 8.) Therefore, Respondent, which failed to timely give notice to terminate either the MOA or the Agreement, remains bound to the successor agreement through operation of the MOA.

The Agreement stated that it would renew from year to year unless either party served written notice upon the other of intent to modify or terminate the Agreement, not less than sixty (60) days prior to its expiration date. As the Agreement's expiration date was December 31, 2012, notice would have been required by October 2, 2012. Respondent did not provide notice of intent to terminate the Agreement by October 2, 2012. Similarly, the MOA remained in effect through April 30, 2013, and until sixty (60) days written notice was given of the desire to modify or amend it. Respondent did not give notice of intent to terminate the MOA by March 1, 2013, 60 days prior to April 30, 2013.[20] As such, it remains bound to the MOA.

Furthermore, by signing the MOA, Respondent agreed to be bound by the "various agreements," including Agreement, which was incorporated into the MOA, and extended the MOA for the life of the negotiated contract absent timely notice of termination. Respondent did not give timely notice of termination regarding either the Agreement or the MOA. Moreover, as the MOA stated that it bound Respondent to newly negotiated contracts between the Union and the Associated Contractors, I find that Respondent became bound and remains bound to the successor agreement.

C. Respondent Violated the Act by Failing to Adhere to the Agreement

As I have found, Respondent operated with what it called a composite crew beginning in January 2014. In so doing, Chris Dowell acknowledged using operators to perform laborers' work. Additionally, in 2014 George Long and Jeffery Deppe witnessed Respondent's four to six–6 person crews working with two or more individuals performing laborers' work, such as luting, shoveling, cleaning up, and raking. The testimony of Brad Long and Deppe that the work they observed was laborers' work stands uncontroverted. Such work is clearly reserved to the Union through the Agreement and the successor agreement.

Chris Dowell admitted that Respondent could not operate with a composite crew if it was signatory to an agreement with the Union. As I have found that Respondent remains signatory to the successor agreement between the Union and the Associated Contractors, I further find that Respondent violated the Act by violating the terms of the successor agreement. In addition to using nonunion employees to perform union work, Respondent failed to remit dues and benefit payments for these employees to the Union. Thus, Respondent completely repudiated the successor agreement. By failing to adhere to the terms of the successor agreement with the Union, Respondent violated Section 8(a)(5) and (1) of the Act. As discussed in greater detail below, I find no merit in Respondent's defenses to this violation.

D. Respondent's 10(b) Defense

Respondent asserts that the charge filed by the Union was time barred by Section 10(b) of the Act. (GC Exh. 1(f).) Section 10(b) of the Act provides that "no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). It is well settled that the 6-month limitations period prescribed by Section 10(b) begins to run only when a party has clear and unequivocal notice, either actual or constructive, of the violation of the Act. *Art's Way Vessels, Inc.,* 355 NLRB 1142, 1147 (2010). Thus, a union must file its charge within 6 months of receiving clear and unequivocal notice of contract repudiation or a complaint based on the conduct will be time-barred, even with regard to contract violations within the 10(b)

[20] Respondent seemed to believe that the MOA continued on from year-to-year after April 30, 2013, but there is no support for this position in the record or within the MOA.

period. *Vallow Floor Coverings, Inc.,* 335 NLRB 20 (2001).

The burden of showing such clear and unequivocal notice is on the party raising the 10(b) defense. *Broadway Volkswagen,* 342 NLRB 1244, 1246 (2004). Where a delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by that party, a 10(b) defense will not be sustained. *A & L Underground*, 302 NLRB 467, 469 (1991); *Taylor Warehouse Corp.,* 314 NLRB 516, 526 (1994), enfd. 98 F.3d 892 (6th Cir. 1996). In order to trigger Section 10(b), repudiation must be both unequivocal and unconditional. *Stage Employees IATSE Local 659 (Paramount Pictures),* 276 NLRB 881, 882 (1985).

The charge in this case was filed on August 26, 2014, therefore, in order to be timely, the violation of the Act could have been committed no earlier than February 26, 2014. I find that prior to Respondent's April 29, 2014 letter, the Union did not have clear and unequivocal notice of Respondent's contract repudiation and, as such, Respondent's 10(b) defense fails.

The Board has found that a statement of intent or a threat to commit an unfair labor practice does not start the statutory 6-months period running. *Leach Corp.,* 312 NLRB 990, 991 (1993), citing *NLRB v. Al Bryant, Inc.,* 711 F.2d 543, 547 (3d Cir. 1983). For example, in *Leach Corp.,* the Board found that beginning to relocate employees to a new facility did not provide clear and unequivocal notice, finding that such notice occurred only when the relocation process involving 280 employees was complete. 312 NLRB at 991. Clearly, Respondent's statements in its letters of October 2013 and January 2014 were no more than statements of intent to terminate its relationship with the Union. I do not find that the statements contained in either letter provided the Union with clear and unequivocal notice of contract repudiation.

A threat to take action is not a final, unconditional decision, and does not trigger the running of the 10(b) period. *Stage Employees IATSE Local 659,* 276 NLRB at 882. In *Stage Employees IATSE Local 659*, the union threatened to inform employers that a member was not eligible for employment unless he paid his dues and insurance premiums. 276 NLRB at 883. The Board held that this was not a final and unconditional decision, and that the Section 10(b) period did not begin to run until the employee was discharged. Id. Analogously, in the instant case, Respondent's indications that it wished to terminate its relationship with the Union via letters in October 2013, and January 2014 and telephone calls in January 2014, did not represent final and unconditional actions.[21] Instead, I find that it was not until Respondent's letter of April 2014, in which it stated that it was "terminating the bargaining relationship with [the Union] effective immediately," that Respondent gave clear and unequivocal notice of contract repudiation, thereby triggering the running of the Section 10(b) period.

The earliest potential evidence of repudiation in this case could be found in Chris Dowell's telephone conversation with Brad Long in late March or early April 2014. In that conversation, Dowell stated, "as far as [I am concerned], [Respondent] did not have an agreement . . . with [the Union]. However, I still do not find that this provides clear and unequivocal notice of repudiation because of Dowell's use of the qualifying words "as far as I'm concerned." See *Stanford Realty Associates Inc.,* 306 NLRB 1061, 1065 (1992) (finding an employer's statement that "as far as she knew [the employer] did not have a contract [with] the union] and she would await further communication with the union, was not a clear and unequivocal refusal to bargain).[22]

Additionally, Respondent engaged in conduct that was contrary to a finding of clear and unequivocal notice prior to the commencement of the 10(b) period. Respondent continued to submit contribution reports to the Union through November 2013, and this final report was not received by the Union until January 2014. These reports included the language, "the signature certifies this report is correct and [Respondent] hereby . . . continues as a signatory employer." Moreover, the November 13, 2013 report has a box checked indicating that Respondent wanted the Union to send it additional contribution report forms. These actions are inconsistent with Respondent's position that it was terminating its bargaining relationship with the Union. Furthermore, the Union would have had no reason to believe that Respondent was operating its business in January or February 2014, as Chris Dowell testified that Respondent did not operate during the winter months.

Finally, Respondent's suggestion that it was acting openly as a nonunion contractor within the Union's jurisdiction prior to the 6-month limitations period also fails. The Union had no reason to know that Respondent was working as a nonunion contractor within its jurisdiction until George Long and Jonathan Deppe went to Respondent's jobsites in May or June 2014. The Board in *Neosho Construction,* 305 NLRB 100 (1991), rejected a repudiation by conduct claim despite 14 years of noncompliance with an 8(f) agreement. Such repudiation requires more than mere breach of the contract; instead, the noncompliance must be so bald as to put the union on notice of the employer's intent to repudiate. 305 NLRB at 102. In *Neosho Construction,* the judge, affirmed by the Board, found that an employer's work within a union's jurisdiction, even when occasionally observed by that union, was not so sufficiently bald as to put the union on notice of the employer's intent to repudiate an 8(f) agreement. 305 NLRB at 103. Similarly, in the instant case, I do not find that Respondent's operation within the Union's jurisdiction prior to February 26, 2014, placed the Union on notice of Respondent's repudiation. There is no evidence that any of Respondent's purportedly nonunion work prior to May 2014 was observed by the Union. In fact, Respondent provided no evidence Respondent was operating nonunion or performing any jobs as a nonunion contractor within the Union's jurisdiction prior to May 2014. Thus, I find Respondent's defense that it repudiated the successor agreement by its conduct prior to February 2014 has no merit.

[21] Specifically, Lindsey Dowell stated that she was certain she *could* get Respondent out of the Agreement and Chris Dowell stated that he *wanted out* of the Agreement. (Emphasis added.) I find that Lindsey Dowell's use of the word "could" and Chris Dowell's use of the word "wanted" do not constitute clear and unequivocal notice of contract repudiation.

[22] In any event, this conversation occurred well within the 10(b) period in this case.

E. Respondent's Single-Person Unit Defense

Respondent asserts as an affirmative defense that the bargaining unit at issue consisted of no more than a single employee. As stated above, an employer's repudiation of an 8(f) agreement will generally violate Section 8(a)(5) of the Act. *Cedar Valley Corp.,* 302 NLRB 823 (1991), enfd. 977 F.2d 1211 (8th Cir. 1992). However, an employer may lawfully repudiate an 8(f) agreement when there is no more than one employee in the bargaining unit. *Seedorff Masonry, Inc.,* 360 NLRB 869, 876 (2014). See also *Stack Electric Inc.,* 290 NLRB 575, 578 (1988), and *Seals Refrigeration, Co.,* 297 NLRB 133, 135 (1989).

It is Respondent's burden of proof to establish the existence of a stable one-person unit. See *Galicks, Inc.,* 354 NLRB 295 (2009), remanded on other grounds 188 L.R.R.M. 3024 (6th Cir. 2010). The Board requires proof that the purportedly single employee unit was a stable one, not merely a temporary occurrence. *McDaniel Electric,* 313 NLRB 126, 127 (1993).

In determining the existence of a stable one-person unit, the Board takes into account typical employment fluctuations in the construction industry. *SAS Electrical Services,* 323 NLRB 1239, 1252 (1997), citing *McDaniel Electric,* 313 NLRB 126, 127 (1993). The Board has found that a period of 17 months with one employee did not establish that the reduction in work force was other than a temporary occurrence. *SAS Electrical Services,* 323 NLRB at 1251. The Board has also found that periods of 15 months with 1 journeyman and 16 months with no journeymen did not establish the existence of a stable, one-person unit. *Galick's, Inc.,* 354 NLRB at 299. Analogously, in the instant case, I do not find that periods of a few months at a time with one laborer establish the existence of a stable one-person unit, especially in light of the fact that Respondent was observed with its crews using more than one employee at a time to perform laborers' work in 2014.

As found supra, Respondent has been using other employees to perform work reserved for the Union in the successor agreement. Respondent's contribution reports to the Union establish that it employed 2 union laborers at various times in 2012 and 2013. Furthermore, Respondent has employed a four to six-person crew while in operation in 2014, and I have found that 2 persons at a time have been performing work reserved to the Union in the unlawfully repudiated collective-bargaining agreement. For example, at the Kimberly Dodge jobsite, at least two persons were witnessed performing laborers' work, such as shoveling and cleaning up. Similar work was observed at the Co-Op Records and 53rd Street shopping center jobs. That these persons are cross-trained to perform other work is of no moment as they were, in fact, performing laborers' work. If two or more employees perform bargaining unit work, the situation is not converted into a "one person unit" if the employer arranges for other employees to perform the work in question. *Seedorff Masonry, Inc.,* 360 NLRB No. 107 slip op at 1 fn. 1. Respondent cannot escape its obligation to honor its collective-bargaining agreement with the Union by assigning unit work to other employees in violation of the successor agreement. Accordingly, I find that Respondent's single-person unit defense fails.

Moreover, Respondent did not establish that its employees were other than full-time, nonsupervisory employees. Despite Chris Dowell's testimony, which I have not credited, Respondent presented no evidence that one member of its crew was a part-time college student. Respondent further presented no evidence that another of its employees was a statutory supervisor. It is well-settled that the party asserting supervisory status bears the burden of proof on the issue by a preponderance of the evidence. *Oakwood Healthcare, Inc.,* 348 NLRB at 694 (citing *Kentucky River Community Care,* 532 U.S. 706, 711–712 (2001)). "[M]ere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority." *Alternate Concepts, Inc.,* 358 NLRB No. 38, slip op. at 3 (2012); see also *Avante at Wilson, Inc.,* 348 NLRB 1056, 1057 (2006) ("[g]eneral testimony asserting that employees have supervisory responsibilities is not sufficient to satisfy the burden of proof when there is no specific evidence supporting the testimony" (citations omitted)); *Golden Crest Healthcare Center,* 348 NLRB 727, 731 (2006). The Board construes a lack of evidence on any of the elements necessary to establish supervisory status against the party asserting that status. *Brusco Tug & Barge,* 359 NLRB 486, 491 (2012), reaffd. 362 NLRB No. 28 (2015), citing *Dean & Deluca New York,* 338 NLRB 1046, 1048 (2003). Therefore, based on a lack of credible evidence presented by Respondent, I decline to find that Alex Johnson was a part-time employee or that Eric Holcomb was a supervisor within the meaning of Section 2(11) of the Act.

F. Respondent's Other Defenses

In addition to the defenses addressed above, Respondent asserted the following affirmative defenses in its amended answer to the complaint: that the charge was not served on Respondent by the Charging Party; that the Regional Director served the charge on an improper entity, i.e. "Taylor Ridge Paving & Construction Co."; that Respondent has no evidence that a majority of its employees are represented by the Union and that the Union has never represented a majority of Respondent's employees; that Respondent's actions were protected by Section 8(c) of the Act; and that Respondent undertook its actions for legitimate nondiscriminatory economic business reasons. (GC Exh. 1(f).)

The General Counsel moved to amend the complaint at hearing in order to correct the name of Respondent and Respondent's counsel did not object. (Tr. 12.) Clearly, by filing its answer and amended answer and appearing at the hearing, Respondent received notice of both the charge and complaint in this case. Therefore, I find Respondent's defense that the Regional Director served the wrong entity is moot.

Respondent's defense on the grounds that the charge was served by the Regional Director and not the Charging Party is similarly unavailing. Section 10(b) of the Act does not provide that the charge must be served solely by the charging party. *Phelps Dodge Copper Products, Corp.,* 96 NLRB 982, 983 (1951). Moreover, although Section 102.14 of the Rules and Regulations of the Board places the responsibility for service on the charging party, it also envisages that service may be effected by the Regional Director. Id. at 983–984. For these reasons, I reject Respondent's defense that service of the charge

was made improperly by the General Counsel.

Respondent's majority status defense also fails. As indicated above, the agreement in this case is an 8(f) agreement, which has no requirement that the Union show majority status. As such, Respondent's actions are not excused by the failure of the General Counsel or Union to show majority status among Respondent's employees.

Respondent's reliance on Section 8(c) of the Act as justification for its actions is misplaced. Section 8(c) applies to noncoercive expressions of views about union representation in general or a specific union, as well as related labor controversies. *The Boeing Co.,* 362 NLRB No. 195, slip op. at 3 (2015) citing *NLRB v. Gissel Packing, Co.,* 395 U.S. 575, 618 (1969) (Under Sec. 8(c), "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"). None of the Respondent's actions here constitute a communication to employees or views about unionism and, as such, its Section 8(c) defense fails.

In addition, Respondent's defense of a legitimate nondiscriminatory motivation is simply not a defense to an alleged violation of Section 8(a)(5) of the Act. See *Treanor Moving & Storage Co.,* 311 NLRB 371, 386 (1993). There is no allegation that Respondent's contract repudiation violates Section 8(a)(3) of the Act and Respondent's motivation for the repudiation is not at issue. Therefore, Respondent's suggestion that its repudiation was nondiscriminatory misses the mark.

G. Cases Relied Upon by Respondent are Distinguishable and Respondent's Citation to Supplemental Authority is Without Merit

The cases relied upon by Respondent in its brief are distinguishable. For example, Respondent relies on *St. Barnabas Medical Center,* 343 NLRB 1125 (2004), in support of its argument that the complaint in this case is time-barred. In *St. Barnabas,* the parties had a collective-bargaining agreement but disagreed as to whether it covered a certain group of employees. The union demanded inclusion of the disputed employees, but the employer refused to apply the contract to them. 343 NLRB at 1125–1126. The parties engaged in negotiations, during which the Board found that the employer's conduct reinforced its position that it did not consider the disputed employees to be part of the unit. 343 NLRB at 1128. At no time during the limitations period did the employer apply any term of the contract to the disputed employees, and never indicated that it would do so. Concluding that the employer had never strayed from its assertion that it did not have to apply the contract to the disputed employees, the Board found that the charge was time-barred. 343 NLRB at 1128–1129.

However, unlike the employer in *St. Barnabas,* Respondent did not clearly and unequivocally repudiate the Agreement, successor agreement, or MOA before the limitations period began on February 26, 2104. Instead, Respondent sent mixed signals by submitting contribution reports through November 2013, and its use of qualifying language in its letters and telephone calls with the Union prior to April 2014. Thus, I do not find this case analogous to the situation in *St. Barnabas,* and find that the complaint here is not time-barred.

Respondent's reliance on *Moeller Bros. Body Shop,* 306 NLRB 191 (1992), to argue that the Union had constructive knowledge of its repudiation of the Agreement and successor agreement is similarly misplaced. In *Moeller Bros.,* the Board stated that a union must use reasonable diligence to learn of an employer's noncompliance with a contract, but also made clear that a union is not required to police its agreements aggressively to meet the reasonable diligence standard. 306 NLRB at 193. Instead, the Board found that the union in *Moeller Bros.* needed only to visit the employer's single shop and could have determined that the employer was not complying with minimal effort and mere observation. 306 NLRB at 192. There is no evidence that Respondent here operated at only one location which could easily be observed by the Union. Therefore, I find *Moeller Bros. Body Shop* distinguishable from the instant case.

Respondent admits that it is engaged in the construction industry and Respondent's crews have been observed operating in both Iowa and Illinois by the Union. Additionally, the Union's jurisdiction spans a large area in both Illinois and Iowa. In other cases involving construction industry employers and multiemployer 8(f) agreements, the Board has found that a union did not have constructive notice of an employer's repudiation merely because the employer performed jobs within the union's jurisdiction. See *Baker Electric,* 317 NLRB 335, 336 (1995) enfd. 105 F.3d 647 (4th Cir. 1997) (finding no constructive notice of repudiation where during 17-year period where employer operated nonunion because the employer's noncompliance was not sufficiently bald as to put the union on notice of its intent to repudiate the agreements); *Neosho Construction Co., Inc.,* 305 NLRB 100, 102 (1991) (finding no constructive notice of construction contractor's repudiation despite 14-year period of noncompliance). Similarly, in this case, I do not find Respondent's actions, over a period of less than 2 years, to be so bald as to have created constructive notice on the part of the Union.

Additionally, *A & L Underground,* 302 NLRB 467 (1991), is factually distinguishable from the instant case. In *A & L Underground,* the Board found clear and unequivocal notice of contract repudiation where the employer always maintained that it signed an agreement with the union for only a single project. 302 NRB at 467. Furthermore, in *A & L Underground,* the employer sent a letter to the union that it was repudiating any agreements with the union "effective immediately" prior to the commencement of the 10(b) period. Id. The facts in this case are distinguishable. As I have set forth in detail above, Respondent did not provide clear and unequivocal notice to the Union of its repudiation outside the 10(b) period. Respondent did not clearly and unequivocally repudiate the contract with the Union until its letter of April 29, 2014. Instead, Respondent provided less than clear communications, indicated that it intended to terminate its relationship with the Union in the future, and submitted contribution reports, the last of which was not received by the Union until January 2014, prior to the commencement of the 10(b) limitations period. Thus, Respondent's actions in this case are not equivalent to those of the employer in *A & L Underground* and I find that case distinguishable from the instant case.

I also find Respondent's reliance on *Ducane Heating Corp.,* 273 NLRB 1389 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986), in support of its limitations defense misplaced. *Ducane Heating* involved application of the 10(b) statute of limitations to suspensions of an employee. 273 NLRB at 1390. In that case, a Regional Director's resurrected of a long-dismissed charge, allegedly based on the discovery of new evidence. Id. at 1391. The Board restated its adherence to the longstanding rule that a charge, dismissed or otherwise disposed of, may not be reinstated outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. Id. at 1390. Circumstances similar to those in *Ducane Heating Corp.* simply do not exist in this case. Thus, I find that *Ducane Heating* has no application to the instant case and does not support Respondent's 10(b) argument.

The case of *James Luterbach Construction Co.,* 315 NLRB 976 (1994), does not support Respondent's argument that upon the expiration of the Agreement, Respondent was no longer bound by any successor agreement. (R. Br. pp. 27–28.) Initially, I note that the Board recognized in that case that an employer may obligate itself to successor agreements, as Respondent did here by operation of the MOA. 315 NLRB at 978. By contrast, employers who have an 8(f) relationship with a union do not have an obligation to bargain for a successor contract. Id. However, unlike in *James Luterbach Construction,* Respondent here agreed to bind itself to successor agreements by the operation of the MOA. Therefore, I find *James Luterbach Construction* distinguishable from this case.

Respondent cites *E.S.P. Concrete Pumping, Inc.,* 327 NLRB 711 (1999), for the proposition that an employer has no obligation to maintain the status quo after the expiration of an 8(f) agreement. (R. Br. p. 28.) In that case, the Board found an employer's repudiation of an 8(f) contract, which was not reduced to writing, unlawful. 437 NLRB at 713. The respondent had been a sole proprietorship when it signed an 8(f) agreement with a union. 327 NLRB at 711. The sole proprietorship was later dissolved and the respondent incorporated. Id. The respondent in that case did not sign any agreements with the union after incorporating. Id. The Board held that the respondent in that case adopted the same 8(f) agreement it had signed when it was a sole proprietorship by its conduct, including holding itself out as a union contractor, and found its later repudiation of that agreement unlawful. 327 NLRB at 714. Thus, Respondent's reliance on this case in support of its argument that it had no obligations to the Union after the Agreement expired is misplaced.

Respondent further cites *Garman Construction Co.,* 287 NLRB 88 (1987), in support of its argument that it was not bound by any successor agreement with the union after the Agreement expired. (R. Br. 28.) Initially, it is worth noting that, to the extent it was inconsistent with *E.S.P. Concrete Pumping,* discussed supra, *Garman Construction Co.,* was overruled. 327 NLRB at 712. Secondly, the *Garman Construction* case is distinguishable from the instant case. In *Garman Construction,* the employer never had more than one employee during the 3-year period prior to its repudiation of the contract. 287 NLRB at 89. However, in the instant case, I have found that Respondent employed more than one laborer at various times during the 2 years prior to its contract repudiation and, more importantly, Respondent was observed during 2014 using more than one employee to perform laborers' work. Additionally, in *Garman Construction,* the employer gave timely notice of its withdrawal from a multiemployer bargaining association at the time that the association's contracts with three unions were expiring. 287 NLRB at 88. In this case, however, Respondent did not provide timely notice of its intent to terminate either the Agreement or MOA and became bound to the successor agreement. Thus, I find the *Garman Construction* case distinguishable from the instant case.

On April 10, 2015, Respondent submitted a document entitled, "Notice of Supplemental Authority," in which it cited *International Union of Operating Engineers Local 18 (Donley's, Inc.),* 2015 WL 1619963 (2015) for the proposition that the agreement herein rolled over from year-to-year. Initially, I would note that the cited case is an Administrative Law Judge's decision, which remains before the Board on exceptions and is not precedential. Additionally, in agreement with the General Counsel, I find that the case is factually distinguishable from the instant case in that it dealt with violations of Section 8(b)(4)(ii)(D). Instead, as I have found above, Respondent bound itself to the successor agreement between the Union and the Associated Contractors by operation of the MOA.

Therefore, for the reasons cited herein, I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to adhere to the Agreement and the successor agreement, and that Respondent's defenses to the violation are without merit.

As I have found merit to the complaint, Respondent's request for attorney's fees from the Board, under the Equal Access to Justice Act, 5 U.S.C. § 504 and Section 102.143 of the Board's Rules and Regulations, is denied.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By repudiating the collective-bargaining agreement between Local Union No. 309, Laborers' International Union of North America and the Associated Contractors of the Quad-Cities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I recommend that the Respondent be ordered to honor and comply with the terms of the collective-bargaining agreement between the Union and Associated Contractors of the Quad-Cities, effective for the period January 1, 2013, through December 31, 2015.

Respondent shall also make whole the unit employees for any loss of earnings or other benefits suffered as a result of Respondent's unlawful repudiation of the collective-bargaining

agreement with the Union. The make-whole remedy shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Respondent shall make all contractually required contributions to the Union's fringe benefit funds it has failed to make since April 29, 2014, including any additional amounts due the funds in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979). Moreover, Respondent shall reimburse the unit employees for any expenses resulting from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating, Inc.,* 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Finally, Respondent shall compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum and file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters for each employee, in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Taylor Ridge Paving & Construction, Taylor Ridge, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

Failing and refusing to bargain in good faith with the Union, Local Union No. 309, Laborers' International Union of North America, as the collective-bargaining representative of all employees performing work as set forth in article 2 of the collective-bargaining agreement between the Union and the Associated Contractors of the Quad-Cities, which is effective from January 1, 2013 through December 31, 2015.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Honor and comply with the terms and conditions of the current collective-bargaining agreement between the Union and the Associated Contractors of the Quad-Cities, effective from January 1, 2013, through December 31, 2015, and, absent timely written notice to the Union, any automatic renewal or extension of it.

Make whole all affected bargaining unit employees for any loss of earnings and other benefits suffered as a result of Respondent's failure to honor the collective-bargaining agreement, in the manner prescribed in the remedy section of this decision.

Make all contractually-required contributions to the Union's fringe benefit funds that Respondent has failed to make since April 29, 2014, and reimburse the unit employees, with interest, for any expenses resulting from its failure to make the required payments under the collective-bargaining agreement, in the manner prescribed in the remedy section of this decision.

Compensate the unit employees for any adverse tax consequences of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards**,** personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Within 14 days after service by the Region, post at its facility in Taylor Ridge, Illinois, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 29, 2014.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 21, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the Union, Local Union No. 309, Laborers' International Union of North America, as the exclusive collective-bargaining representative of all employees performing work as set forth in article 2, of the collective-bargaining agreement between the Union and the Associated Contractors of the Quad-Cities (Associated Contractors), which is effective from January 1, 2013, through December 31, 2015.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor and comply with the terms and conditions of the 2013–2015 collective-bargaining agreement between the Union and the Associated Contractors, and, absent timely written notice to the Union, any automatic renewal or extension of it.

WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of our failure to honor the collective-bargaining agreement.

WE WILL make all contractually required contributions to the Union's fringe benefit funds that we have failed to make since April 29, 2014, and reimburse our employees, with interest, for any expenses resulting from its failure to make the required payments under the collective-bargaining agreement.

WE WILL compensate all unit employees adversely affected for any adverse income tax consequences of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

taylor ridge paving & construction co.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25–CA–135372 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.